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LETTER DATED 16 SEPTEMBER 1996 FROM THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991 ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to inform you that on 13 September 1996 a Trial Chamber of the Tribunal rendered a decision in the proceedings against Ivica Rajić in which it certified "that the failure to effect personal service of the indictment can be ascribed to the refusal to cooperate with the International Tribunal by the Republic of Croatia and by the Federation of Bosnia and Herzegovina and entrust[ed] the responsibility of so informing the Security Council to the President of the International Tribunal, pursuant to Sub-rule 61(E)".

Accordingly, as President of the Tribunal, after consulting the Presiding Judges of the Chambers, I hereby inform you of the "refusal" by the Republic of Croatia ("Croatia"), a Member State of the United Nations, and by the Federation of Bosnia and Herzegovina ("the Federation"), to cooperate with the Tribunal and to comply with its orders, as required by article 29 of the Tribunal's Statute.

It is, moreover, my duty to inform you that the failure to cooperate in the arrest of Ivica Rajić is not an isolated incident, but forms part of a general pattern of failure in respect of matters concerning the Tribunal.

As I have informed the Security Council and General Assembly on a number of occasions, notably in the Tribunal's annual reports, the Federation and Croatia are systematically failing to comply with the Tribunal's orders for the arrest of accused. In particular, the following Bosnian Croats have not been arrested by either the Federation or Croatia: Dario Kordic, Mario Čerkez, Ivan Santić, Pero Skopljak, Zoran Marinic, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Vladimir Santić, Stipo Alivić, Drago Josipović, Marinko Katava and Dragan Papić. Arrest warrants for some of these accused have now been outstanding for more than 10 months. Zlatko Alekovski has reportedly been arrested by the Croatian authorities but has not yet been delivered to the Tribunal.

As the Secretary-General of the United Nations noted in his report to the Security Council (S/25704), "an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations". By refusing to cooperate in the execution of the arrest warrant against Ivica Rajić, and others, Croatia has failed to comply with an enforcement measure under Chapter VII of the United Nations Charter. In addition, both Croatia and the Federation have not lived up to the commitments undertaken by signing the Dayton Peace Agreement, as described by the Trial Chamber in its decision of 13 September 1996.

(Signed) Antonio CASSESE
President

UNITED NATIONS

Annex

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-95-12-R61

Date: 13 September 1996

Original: ENGLISH AND FRENCH

IN THE TRIAL CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Rustam S. Sidhwa
Judge Lal C. Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **13 September 1996**

PROSECUTOR

v.

IVICA RAJIĆ
a/k/a
VIKTOR ANDRIĆ

REVIEW OF THE INDICTMENT PURSUANT TO RULE 61 OF THE RULES OF PROCEDURE AND EVIDENCE

The Office of the Prosecutor:

Mr. Eric Ostberg
Mr. Gregory Kehoe
Mr. Andrew Cayley

I. INTRODUCTION

On 23 August 1995, the Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("International Tribunal") submitted to Judge Rustam S. Sidhwa, a Judge of this Trial Chamber, an indictment against Ivica Rajić, also known as Viktor Andrić. Judge Sidhwa confirmed the indictment on 29 August 1995 and, on the same day, signed warrants of arrest which were sent to the Republic of Bosnia and Herzegovina and to the Federation of Bosnia and Herzegovina. An additional warrant of arrest, signed on 8 December 1995 by Judge Lal C. Vohrah, was sent to the Republic of Croatia.

On 9 February 1996, the International Tribunal received a power of attorney signed by Ivica Rajić, authorising Mr. Zvonamir Hodak to act as his legal representative in proceedings before the International Tribunal.

On 6 March 1996, Judge Sidhwa issued an order inviting the Prosecutor to report on its efforts to effect service of the indictment. After hearing the Prosecutor, Judge Sidhwa was satisfied that the Prosecutor had taken all reasonable steps to effect personal service and had otherwise tried to inform the accused of the existence of the indictment. Accordingly, on the same day, he ordered that the indictment against Ivica Rajić be submitted to this Trial Chamber for review under Rule 61 of the International Tribunal's Rules of Procedure and Evidence ("Rules"). On 26 March 1996, Mr. Hodak was informed of the Rule 61 review hearing scheduled in respect of Ivica Rajić.

The Prosecutor filed a motion on 2 April 1996 requesting that the identity of seven Prosecution witnesses be protected from disclosure to the public and the media. This motion was granted by the Trial Chamber on the same day.

On 2 and 3 April 1996, the Rule 61 hearing regarding Ivica Rajić was conducted by this Trial Chamber. At that time, supporting evidence, both written and oral, was received by the Chamber in open court.

Thereafter, the Prosecutor requested, and was granted, an adjournment of the Rule 61 proceeding so that it could present additional evidence on the issue of the character of the conflict. Such written evidence was submitted to this Trial Chamber on 10 June 1996.

Pursuant to Rule 74, on 30 April 1996, the Republic of Croatia requested leave to appear as *amicus curiae* in this matter on the issue of the nature of the conflict. The Prosecutor filed its opposition to this request on 15 May 1996. On 24 May 1996, the Trial Chamber issued an order rejecting Croatia's request.

On 7 August 1996, the Trial Chamber ordered the Prosecutor to file any material which the Prosecutor wished the Trial Chamber to take into account under Sub-rule 61(E) relating to the efforts to effect personal service of the indictment and the failure or refusal of States to cooperate with the International Tribunal. The Prosecutor filed such material on 12 August 1996, and supplemented this with further material filed on 13 August 1996 with leave of the Trial Chamber.

THE TRIAL CHAMBER, HAVING CONSIDERED the written and oral submissions and arguments of the Prosecutor,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. The Charges

1. Ivica Rajić is accused of ordering the 23 October 1993 attack against the village of Stupni Do, which was located in the Republic of Bosnia-Herzegovina. The attack was allegedly carried out by the Croatian Defence Council ("HVO"), which are identified as the armed forces of the self-proclaimed Croatian Community of Herceg-Bosna ("HB"), acting under Ivica Rajić's control. Ivica Rajić is charged under six counts: Count I - a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(a) (wilful killing) of the Statute of the International Tribunal ("Statute"); Count II - a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(d) (destruction of property) of the Statute; and Count III - violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute. In the alternative, he is charged with: Count IV - command responsibility for a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(a) (wilful killing) of the Statute; Count V - command responsibility for a grave breach of the Geneva Conventions of 1949, as recognised by Article 2(d) (destruction of property) of the Statute; and Count VI - command responsibility for violations of the laws and customs of war, as recognised by Article 3 (deliberate attack on a civilian population and wanton destruction of a village) of the Statute.

B. Preliminary Matters

2. Before reviewing the indictment against Ivica Rajić, it is necessary to consider some preliminary matters. One such matter is the purpose and nature of Rule 61 proceedings. These proceedings give the Prosecutor the opportunity to present in open court the indictment against an accused and the evidence supporting such indictment. Rule 61 proceedings

therefore are a public reminder that an accused is wanted for serious violations of international humanitarian law. They also offer the victims of atrocities the opportunity to be heard and create a historical record of the manner in which they were treated. If the Trial Chamber determines that there are reasonable grounds for believing that the accused committed any or all of the crimes charged in the indictment, it shall issue an international arrest warrant. The issuance of such a warrant, with which all States that are Members of the United Nations are obliged to comply, enables the arrest of the accused if he crosses international borders. After a Rule 61 proceeding, the President of the International Tribunal may notify the Security Council of the failure of a State to cooperate with the International Tribunal. The Prosecutor has submitted material in which it is asserted that failure to effect personal service of the indictment on Ivica Rajić is due in whole or in part to the failure of the Republic of Croatia and the Croatian Community of Herzeg-Bosna to cooperate with the International Tribunal.

3. A Rule 61 proceeding is not a trial *in absentia*. There is no finding of guilt in this proceeding. The only determination the Trial Chamber makes is whether there are reasonable grounds for believing that the accused committed the crimes charged in the indictment. As part of this determination, the Chamber considers whether the acts with which the accused is charged, if proven beyond a reasonable doubt at trial, are crimes falling within its subject-matter jurisdiction and ensures that the charges against the accused are well founded in fact. No penalty is imposed on the accused in a Rule 61 proceeding. The only consequences of the proceeding are the public airing of the evidence against the accused and the possible issuance of an international arrest warrant, thereby enhancing the likelihood of the arrest of the accused and enabling the International Tribunal to discharge its mandate instead of being rendered ineffective by the non-compliance of States. Thus the procedure furthers the purposes for which the International Tribunal was established.

4. Certain evidentiary issues must also be resolved at this stage. The Trial Chamber's examination of the charges against Ivica Rajić requires a review of the evidence submitted by the Prosecutor in support of the indictment. This evidence includes the material that was presented to Judge Sidhwa at the time of the confirmation of the indictment. The Chamber also admitted additional evidence during and after the Rule 61 hearing, including the

testimony of witnesses whose statements were not submitted to Judge Sidhwa. Such evidence is admissible under Sub-rules (B) and (C) of Rule 61, which govern the conduct of proceedings under the Rule. Sub-rule 61(B) states that the Prosecutor shall submit the indictment at issue to the Trial Chamber in open court. It further provides that the Prosecutor shall submit the evidence that was before the confirming Judge and "may also call . . . and examine any witness whose statement has been submitted to the confirming Judge." Sub-rule 61(C) allows additional evidence to be submitted at the hearing: it requires the Trial Chamber to decide the case based on the evidence referred to in Sub-rule 61(B) (*i.e.*, the evidence that was before the confirming Judge) and "such additional evidence as the Prosecutor may tender". The Trial Chamber concludes that the testimony of witnesses whose statements were not before the confirming Judge is within the purview of Sub-rule 61(C) because this testimony constitutes "such additional evidence as the Prosecutor may tender". Such a reading of Rule 61 is also consistent with the practice of the International Tribunal in previous Rule 61 proceedings. *See, e.g., Prosecutor v. Karadžić & Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence (No. IT-95-18-R61, T. Ch. I, 11 July 1996); *Prosecutor v. Mrksić, Radić & Sljivančanin*, Review of Indictment Pursuant to Rule 61 (No. IT-95-13-R61, T. Ch. I, 3 Apr. 1996); *Prosecutor v. Martić*, Decision (No. IT-95-11-R61, T. Ch. I, 8 Mar. 1996) (*"Martić Rule 61 Decision"*).

5. A final evidentiary matter that bears mention is the testimony of Mr. Ehsanullah Bajwa, an investigator in the Office of the Prosecutor, which was presented during the Rule 61 hearing. Mr. Bajwa testified that he had taken the statements of several persons who witnessed the attack on Stupni Do and orally recounted portions of these statements to the Chamber. The written statements that were summarised by Mr. Bajwa during the Rule 61 hearing have been submitted to, and examined by, the Chamber. Mr. Bajwa's testimony is relevant to the decision of the Trial Chamber only to the extent that it evidences the taking of certain statements. Otherwise, the Trial Chamber has relied solely on the written statements and the other evidence before the Chamber. This is discussed in detail by Judge Sidhwa in his separate opinion.

C. Subject-Matter Jurisdiction

6. The first issue that the Trial Chamber must consider is whether it has subject-matter jurisdiction over the offences alleged against Ivica Rajić. This requires the Trial Chamber to examine Articles 2 and 3 of the Statute, under which Ivica Rajić is charged.

1. Article 2 of the Statute - Grave Breaches

7. The Prosecutor has charged Ivica Rajić with the wilful killing of civilians and the destruction of property under Article 2 of the Statute. In the jurisdictional phase of the case of *Prosecutor* v *Tadić*, the International Tribunal's Appeals Chamber held that Article 2 encompasses the grave breaches provisions of the 1949 Geneva Conventions and that there are two prerequisites for its application: (a) there must be an international armed conflict in the sense of Article 2 common to the Conventions; and (b) the crime must be directed against persons or property protected under the provisions of the relevant Convention. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 81, 84, (No. IT-94-1-AR72, App. Ch., 2 Oct. 1995)("*Tadić Appeal Decision on Jurisdiction*").

8. Because the crimes alleged by the Prosecutor were directed against civilian persons and property, the Geneva Convention relevant to this case is the Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 ("Geneva Convention IV"). Based on the provisions of this Convention, the Trial Chamber first considers whether the Prosecutor has shown sufficiently that the alleged attack on Stupni Do took place during an international armed conflict and then addresses the issue of whether the attack involved persons and/or property protected under Geneva Convention IV.

a. International Armed Conflict

9. The evidence submitted by the Prosecutor indicates that the attack on the village of Stupni Do was part of the clashes occurring in central and southern Bosnia between the HVO (the armed forces of the Croatian Community of Herceg-Bosna) on the one hand, and the

forces of the Bosnian Government on the other. These clashes started in the latter part of 1992 and continued until the conclusion of the Washington Peace Agreement in March 1994. *See Bosnia and Herzegovina-Croatia: Preliminary Agreement Concerning The Establishment Of A Confederation* 33 I.L.M. 605 (18 March 1994). The HVO's attacks in the area of the Lašva River Valley in April 1993 and on Mostar in May 1993 were part of these clashes. The village of Stupni Do was located in the same general area as the objects of these attacks, approximately four kilometres south-east of the town of Vares. The accused Ivica Rajić was apparently the commander of the HVO's second operational group in the Central Bosnian Operational Zone. The evidence further indicates that the second operational group included the Bobavac Brigade, which actually carried out the attack on the village of Stupni Do, and that prior to the attack Ivica Rajić personally took command of the Bobavac Brigade. Thus, the "conflict" that the Trial Chamber has to examine in this case may be described broadly as the fighting between the HVO and the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1994.

10. Deciding on the character of an armed conflict is a difficult exercise in a world "where power struggles are in every continent carried on by destabilisation, interference in civil strife, comfort, aid and encouragement to rebels, and the like." *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14, p. 543 (Merits Judgment of 27 June 1986) ("*Nicaragua*") (diss. op. of Judge Jennings). In the case of the former Yugoslavia, for example, one is frequently confronted with conflicts between the citizens of a State and their central government in which other States are allegedly involved to a greater or lesser degree.

11. In the *Tadić Appeals Decision on Jurisdiction*, the Appeals Chamber provides some guidance for determining the character of such conflicts. The Appeals Chamber held at paragraph 72 that:

> To the extent that the conflicts [in the former Yugoslavia] had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven).

The conflict between the HVO and Bosnian Government forces may be regarded as analogous to the conflicts described above. It therefore should be treated as internal unless the direct involvement of a State is proven. Thus, the issue of whether the alleged attack on the civilian population of Stupni Do was part of an international armed conflict turns on the existence and extent of outside involvement in the clashes between the Bosnian Government forces and the HVO in central and southern Bosnia.

12. The Appeals Chamber's decision on jurisdiction in the *Tadić* case did not, however, set out the quantum of involvement by a third State that is needed to convert a domestic conflict into an international one. The Prosecutor has presented two theories regarding the internationality of the conflict at issue in this case:

> [T]he conflict can be classified as international on the basis of the direct military involvement of Croatia in [Bosnia] and the existence of hostilities resulting therefrom, and the existence of hostilities between [Bosnia] and the Croatian Community of HB, which was very closely related to and controlled by Croatia and its armed forces.

Prosecutor's Brief on the Applicable Law for the Armed Conflict involving Bosnia-Herzegovina and Croatia and the Self-proclaimed Croatian Community of Herceg-Bosna at 4, *Prosecutor v. Ivica Rajić* (No. IT-95-12-R61 T. Ch. II, 1 April 1996) ("*Prosecutor Brief*"). Each of these contentions will be considered below.

i. Direct Military Intervention by Croatia

13. The Chamber finds that, for purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one. The evidence submitted by the Prosecutor provides reasonable grounds to believe that between 5000 to 7000 members of the Croatian Army, as well as some members of the Croatian Armed Forces ("HOS"), were present in the territory of Bosnia and were involved, both directly and through their relations with HB and the HVO, in clashes with Bosnian Government forces in central and southern Bosnia.

14. There is no doubt that elements of the Croatian Army were located on the territory of Bosnia at least during the period 1992 to March 1994. This presence was reported in several United Nations documents, including reports of the United Nations Secretary-General based on information relayed by the United Nations Protection Force ("UNPROFOR") in Bosnia. Security Council statements and General Assembly resolutions. *See, e.g., Further Report of the Secretary-General Pursuant to Security Council Resolution 743 (1992)*, U.N. SCOR, 47th Sess., ¶ 28, U.N. Doc. S/24848 (24 Nov. 1992) (*"S.G. 24 Nov. 1992 Report"*); *Report of the Secretary-General*, U.N. GAOR, 47th Sess., ¶¶ 9-11, U.N. Doc. A/47/747 (3 Dec. 1992); G.A. Res. 47/121, U.N. GAOR, 47th Sess., ¶ 5, U.N. Doc. A/47/747 (18 Dec. 1992) ("G.A. Res. 47/121"); *Report of the Secretary-General Pursuant to Paragraph 12 of General Assembly Resolution 47/121*, U.N. GAOR, 47th Sess., ¶ 32, U.N. Doc. A/47/869 (18 Jan. 1993) (*"S.G. 18 Jan. 1993 Report"*); *Statement by the President of the Security Council*, U.N. SCOR, 48th Sess., U.N. Doc. S/25746 (10 May 1993) (*"S.C. 10 May 1993 Statement"*), *Letter dated 1 February 1994 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 49th Sess. U.N. Doc. S/1994/109 (2 Feb. 1994) (*"S.G. 1 Feb 1994 Letter"*).

15. The Republic of Croatia has acknowledged that elements of its army were present in Bosnian territory, although it has taken varying positions on the status of the Croatian troops in Bosnia and their role in the fighting there. In early 1993, for example, Croatia stated that if any units of the Croatian Army were in Bosnia, "they would be operating in accord with the authority of the Government of the Republic of Bosnia and Herzegovina". *S.G. 18 Jan. 1993 Report, supra*, ¶ 32. By the summer, however, Croatia denied that there were any members of the Croatian Army present in Bosnia. *See Letter dated 3 June 1993 from the President of the Republic of Croatia addressed to the Secretary-General*, U.N. SCOR, 48th Sess., ¶ 3(b), U.N. Doc. S/25885 (4 June 1993). Croatia changed again its position shortly thereafter. It admitted that Croatian Army units were present in the "border areas" between Croatia and Bosnia, but it claimed that they were placed there in accordance with the 12 July 1992 Joint Agreement between Croatia and the Republic of Bosnia-Herzegovina. Further, Croatia conceded that the HVO had been "joined by individuals, former members of the Croatian Armed Forces natives of Bosnia and Herzegovina, who had joined, as volunteers, the

Croatian Armed Forces during the Serbian aggression against Croatia in order to defend the Republic of Croatia, and have now returned to defend their century-old homes." *Letter dated 16 July 1993 from the President of the Republic of Croatia addressed to the Secretary-General*, U.N. SCOR, 48th Sess., ¶ 2(e), U N. Doc. S/26101 (16 July 1993).

16. By early 1994, Croatia effectively admitted that its army was present in Bosnia against the will of the Bosnian Government. At the start of peace talks with Bosnia, Croatia informed the United Nations Secretary-General that "as a goodwill gesture to the Sarajevo Government", Croatia was ready to withdraw certain units from the border areas with Bosnia and Herzegovina - *i.e.*, it was "ready to call off the units of the Croatian Army on the left bank of the Neretva River and elements of the Croatian Army on the right bank of the Neretva." *Letter dated 11 Feb. 1994 from the Deputy Prime Minister and Minister for Foreign Affairs of Croatia to the Secretary-General*, U.N. SCOR, 49th Sess., at 3, U.N. Doc. S/1994/177 (16 Feb. 1994). Some days later, Croatia reported that "Croatian volunteers that had been situated in . . . Central Bosnia have returned to the Republic of Croatia on 10 February 1994" and that "[o]n 16 February . . . elements of the Croatian Army left the wider Neretva river region and have been repositioned in the Metkovic area on the territory of the Republic of Croatia." *Letter dated 17 Feb. 1994 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/197 (18 Feb. 1994).

17. The Trial Chamber has received substantial evidence indicating that members of the Croatian Army were present in Bosnia at the behest of the Croatian Government. Documentary support for this assertion includes a 5 June 1992 order from the Croatian Minister of Defence mobilizing the 101st brigade of the Croatian Army for service in Bosnia. *See* Supporting Record of the Rule 61 Proceeding of Ivica Rajić ("SR") at 781. A subsequent document confirms that this mobilization occurred. On 16 March 1993, the Deputy Head of Army Command of HB and the HVO, Miro Andric, authorised the return of one Ivan Zlatic of the 101st brigade of the Croatian Army to his original unit. SR at 776. In addition, the Prosecutor has submitted copies of internal HVO correspondence which shows that the HVO was trying to determine the status of HV officers serving in the HVO. *See* SR at 745-44, 755. These documents suggest that HV soldiers serving in the HVO were not volunteers, but rather

were mobilized by Croatia and were serving in their capacity as HV soldiers with a special status within the HVO.

18. The above conclusion is supported by witness statements reporting sightings of entire brigades of Croatian Army troops in Bosnia. SR at 682, 724. It is unlikely that units of this size would of their own accord volunteer for service in a foreign country. Moreover, witnesses testified to seeing military equipment such as tanks, helicopters and artillery bearing Croatian Army insignia in central and southern Bosnia. SR at 698, 720, 942, 950. It does not seem probable that such equipment could have been transported to Bosnia by volunteers without the cooperation of the Croatian Government.

19. The material before the Trial Chamber also suggests that, contrary to Croatia's claims, Croatian troops were not just stationed in border areas and that they were involved in hostilities against Bosnian Government forces in central and southern Bosnia. In November 1992, the Secretary-General reported that the Croatian Army was "reliably reported to be engaged extensively in the Republic [of Bosnia-Herzegovina]." *S.G. 24 Nov. 1992 Report, supra*, ¶ 47. A month later, the Secretary-General reiterated this finding and the General Assembly implicitly endorsed it by calling for the removal of "all elements of the Croatian Army that may be in the Republic of Bosnia and Herzegovina and that are already not operating in accord with the authority of the Government". G.A. Res. 47/121, *supra* ¶ 5; *see also* European Council Declaration on Former Yugoslavia ¶ 2 (Edinburgh, 11-12 December 1992) (noting that Croatia carried a share of the responsibility for attacks on the Muslim population of Bosnia-Herzegovina). In May 1993, the Security Council expressed its grave concern at the new military offensive of the Bosnian Croats in the area of Mostar, Jablanica and Drenica and called upon Croatia to "adhere strictly to its obligations under Security Council resolution 752, including putting an end to all forms of interference and respecting the territorial integrity of the Republic of Bosnia and Herzegovina." *S.C. Statement, 10 May 1993, supra*, at 1105. On 1 February 1994, the Secretary-General stated that UNPROFOR had indicated that there were no new reports of significant military activity in its area of operations. UNPROFOR's assessment, which was based on previous information, was that between 3000 and 5000 members of the Croatian Army were in central Bosnia and the Croatian Army had directly supported the HVO in terms of manpower, equipment and

weapons. The involvement of Croatian Army soldiers had become more prevalent since "the offences of the Bosnia and Herzegovina Government forces against the HVO have become successful." *S.G. 1 Feb. 1994 Letter, supra*, at 1.

20. The United Nations' findings are supported by the statements of people on the ground. The British Battalion of UNPROFOR, as well as other witnesses, saw Croatian Army troops and equipment in and around the central Bosnian towns of Vares, Prozor and Gorni Vakuf during 1992 and 1993. British Battalion Reports of December 1992 - October 1993, SR at 933, 937-936, 940, 944, 950, 952, 956, 958, 959, 970, 978, 979, 981, 994, 1006, 1010, 1023, 1028, 1038, 1050, 1051. In May 1993, the British Battalion reported evidence of the involvement of certain units of the Croatian Army in fighting against Bosnian Government forces around the town of Jablanica. British Battalion Report of 28 May 1993, SR at 1023. In addition, witnesses reported sightings of the bodies of soldiers wearing HV insignia after clashes between HB and the Bosnian Government forces. *See* SR at 681, 698-99. The Chamber has received witness testimony and statements indicating that members of the HV and HOS were present in the area of Stupni Do at around the time of the alleged attack on the village. *See* Official Transcript of the Ivica Rajić Rule 61 Proceeding at 89-90; SR at 103, 147.

21. The materials described above constitute prima facie evidence that units of the Croatian Army were present in central Bosnia during the period from late 1992 to March 1994 and that these Croatian Army troops were sent to Bosnia by the Croatian Government and were engaged, alongside the Bosnian Croat forces, in fighting against the forces of the Bosnian Government. There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.

ii. Croatia's Control of the Bosnian Croats

22. The Chamber's finding regarding the nature of the conflict stated above is all that is necessary to meet the international armed conflict requirement of Geneva Convention IV. Nonetheless, for purposes of the Prosecutor's arguments regarding persons protected under Geneva Convention IV, which are discussed below, the Chamber believes it appropriate to consider the Prosecutor's additional argument that the conflict between the Bosnian Government and HB may be regarded as international because of the relationship between Croatia and HB. The Prosecutor has asserted that Croatia exerted such political and military control over the Bosnian Croats that the latter may be regarded as an agent or extension of Croatia.

23. The Trial Chamber believes that an agency relationship between Croatia and the Bosnian Croats - if proven at trial - would also be sufficient to establish that the conflict between the Bosnian Croats and the Bosnian Government was international in character.

24. The issue of when a group of persons may be regarded as the agent of a State has been considered frequently in the context of imposing responsibility on States for the actions of their agents. The International Law Commission considered the issue in its 1980 Draft Articles on State Responsibility. Draft Article 8 provides in relevant part that the conduct of a person or a group of persons shall "be considered as an act of the State under international law" if "it is established that such person or group of persons was in fact acting on behalf of that State". 1980 II (Part Two) Y.B. Int'l L. Commission at p.31. The matter was also addressed by the International Court of Justice in the *Nicaragua* case. There, the Court considered whether the *contras*, who were irregular forces fighting against the Government of Nicaragua, were agents of the United States of America in order to decide whether the United States was liable for violations of international humanitarian law allegedly committed by the *contras*. The Court held that the relevant standard was

> whether the relationship was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.

Nicaragua, 1986 I.C.J. Rep. ¶ 109. It found that the United States had financed, organised, trained, supplied and equipped the *contras* and had assisted them in selecting military and paramilitary targets. These activities were not, however, sufficient to hold the United States liable for any violations of international humanitarian law committed by the *contras*.

25. The Trial Chamber deems it necessary to emphasise that the International Court of Justice in the *Nicaragua* case considered the issue of agency in a very different context from the one before the Trial Chamber in this case. First, the Court's decision in the *Nicaragua* case was a final determination of the United States' responsibility for the acts of the *contras*. In contrast, the instant proceedings are preliminary in nature and may be revised at trial. Second, in the *Nicaragua* case the Court was charged with determining State responsibility for violations of international humanitarian law. It therefore rightly focused on the United States' operational control over the *contras*, holding that the "general control by the [United States] over a force with a high degree of dependency on [the United States]" was not sufficient to establish liability for violations by that force. *Nicaragua*, 1986 I.C.J. Rep. ¶ 115. In contrast, this Chamber is not called upon to determine Croatia's liability for the acts of the Bosnian Croats. Rather, it is required to decide whether the Bosnian Croats can be regarded as agents of Croatia for establishing subject-matter jurisdiction over discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Convention. Specific operational control is therefore not critical to the inquiry. Rather, the Trial Chamber focuses on the general political and military control exercised by Croatia over the Bosnian Croats.

26. The evidence submitted in this case establishes reasonable grounds for believing that the Bosnian Croats were agents of Croatia in clashes with the Bosnian Government in central and southern Bosnia from the autumn of 1992 to the spring of 1993. It appears that Croatia, in addition to assisting the Bosnian Croats in much the same manner in which the United States backed the *contras* in *Nicaragua*, inserted its own armed forces into the conflict on the territory of Bosnia and exercised a high degree of control over both the military and political institutions of the Bosnian Croats.

27. The Prosecutor has provided the Chamber with considerable evidence of Croatian control of the military arm of the Bosnian Croats, the HVO. The HVO was founded in the

face of "aggression on the territories of the Croatian Community of Herceg-Bosna", with the objective of defending "the sovereignty of the territories of the Croatian Community of Herceg-Bosna and to protect the Croatian people as well as other peoples in this community attacked by the aggressor." Translation of the Decision on the Creation of the Croatian Defence Council (HVO) (8 April 1992), SR at 171. In addition to the assistance of Croatian Army personnel the evidence indicates that Croatia provided financial support for the Bosnian Croats, particularly for the purchase of arms, and logistical support in the form of assistance in purchasing weapons and the provision of military equipment. *See, e.g.*, 3 March 1992 Letter from the President of the Municipal Board, Bugojno HDZ to the Regional Crisis Staff, Grude (noting that in relation to the equipment necessary for the defence of Bugojno, the Board would use the 540,000 DM previously granted by the Ministry of Finance of the Republic of Croatia and that the Board had placed the fund "at the disposal of the Ministry of National Defence of the Republic of Croatia so that the Ministry can cover the aforementioned expenses"); Receipt issued by the Ministry of Finance of Croatia (confirming that a representative of the Bugojno HDZ had received 10,000 DM); British Battalion Reports of 13 Mar. 1993 (reporting HVO claims of support from Zagreb and Vienna in the supply of equipment and finance); 21 Aug. 1993 (noting HV supply of manpower and ammunition to HVO), 1 Oct. 1993 (noting regular sighting of HV/HVO helicopter near Travnik); 6 Oct. 1993 (reporting more sightings of HV/HVO helicopter); 22 Oct. 1993 (noting reports that HVO was employing armour and artillery belonging to HV). SR at 783, 787, 932, 942, 950, 959, 1044.

28. On 1 August 1993, a company of the British Battalion reported that General Praljak, who was "reputedly the former Croatian Deputy Minister for National Defence" had become the commander of the HVO. SR at 986. Finally, witnesses report that Croatian officials exerted great influence on the HVO during negotiations with other parties. SR at 687-90, 721.

29. In addition to the evidence of Croatian domination of the military institutions of the Bosnian Croats described above, the Prosecutor has also provided the Trial Chamber with material that suggests that the Bosnian Croat political institutions were influenced by Croatia. The Prosecutor alleges that from the earliest days of the creation of HB, it was politically dominated by Croatia. It appears that both Croatia and HB were governed by branches of the

same party, the Croatian Democratic Union, also known as the HDZ, and there is evidence that the Bosnian Croats considered themselves to be closely linked to Croatia. For example, the 18 December 1991 founding document of HB at page 177 notes the Bosnian Croats' historical and ethnic alliance with Croatia and states that they "are aware that their future is linked to the future of the entire Croat nation." In addition, the Prosecutor has submitted the statement of a Bosnian Army officer, who indicates that he personally saw the Bosnian Croat leader, Ante Valenta, proclaim that HB was Croatian ground which belonged to Croatia and that he saw a video tape of the Bosnian Croat leader, Dario Kordić, in which Kordić stated that central Bosnia was part of the Republic of Croatia. SR at 705. Another Bosnian witness, who was a resident of Travnik in central Bosnia, also reported hearing similar statements from these persons. SR at 687 - 690.

30. In its 7 April 1992 decision recognising the existence of the Republic of Bosnia and Herzegovina, Croatia explicitly stated that recognition of Bosnia implied that "the Croatian people, as one of the three constituent nations in Bosnia and Herzegovina, shall be guaranteed their sovereign rights" and granted Bosnian Croats the right to Croatian citizenship. SR at 812.

31. Croatia has itself conceded - both implicitly and explicitly - its military and political control and influence over the Bosnian Croats. For example, in November 1993, the Deputy Prime Minister and Foreign Minister of the Republic of Croatia, Mate Granic, and the Prime Minister of the Republic of Bosnia and Herzegovina, Haris Silajdzic, reached an agreement regarding modalities for ending the fighting between the Bosnian Croats and the Bosnian Government. *See Letter dated 18 November from the Permanent Representative of Croatia to the United Nations addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., at 2, U.N. Doc. S/26764 (18 Nov. 1993). At the time of the establishment of a federation between the Bosnian Croats and the Bosnian Government and the creation of a confederation between Bosnia-Herzegovina and Croatia, the latter not only signed the confederation agreement but also was a party to the federation agreement. *See Letter dated 3 March 1994 from the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations addressed to the Secretary-General*, U.N. SCOR, 49th Sess., at 2, U.N. Doc. S/1994/255 (4 March 1994). Perhaps most tellingly, at the time of

the conclusion of the Dayton Peace Agreement, the Foreign Minister of the Republic of Croatia, Mate Granic, wrote to the foreign ministers of several States assuring them that the Republic of Croatia would take all necessary steps "to ensure that personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [sic] and comply with the provisions of [certain portions of the Dayton Peace Agreement]". *Letter dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. GAOR, 50th Sess., U.N. SCOR, 50th Sess., at 126-130, U.N. Doc. A/50/790 & S/1995/999 (30 Nov. 1995) (*"Dayton Peace Agreement"*).

32. The evidence detailed above provides reasonable grounds for the determination that the Bosnian Croats can, for the purposes of these proceedings, be regarded as agents of Croatia in respect of discrete acts which are alleged to be violations of the grave breaches provisions of the Geneva Conventions.

b. Protected Persons and Property

33. Having concluded that the attack on Stupni Do was part of an international armed conflict, the Trial Chamber now turns to the second requirement for the application of Article 2 of the International Tribunal's Statute: whether the alleged crimes were "against persons or property protected under the provisions of the relevant Geneva Convention". In the *Tadić Appeals Decision on Jurisdiction*, the Appeals Chamber stated at paragraph 81 that "the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves". In order for the Trial Chamber to determine whether this requirement is met it is necessary to examine the definitions of protected persons and property contained in Geneva Convention IV.

i. Protected persons

34. Article 4 of Geneva Convention IV, which addresses the protection of civilian persons in time of war, reads in pertinent part:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Under this definition, Bosnian civilian victims qualify as "protected persons" if they are "in any manner whatsoever . . . in the hands of a Party to the conflict . . . of which they are not nationals." The Prosecutor asserts that the HVO forces under the command of Ivica Rajić were under the control of Croatia to such an extent that Bosnian persons who were the object of the attack by Ivica Rajić's forces may be regarded as being in the hands of Croatia.

35. The Trial Chamber has found that HB and the HVO may be regarded as agents of Croatia so that the conflict between the HVO and the Bosnian Government may be regarded as international in character for purposes of the application of the grave breaches regime. The question now is whether this level of control is also sufficient to meet the protected person requirement of Article 4 of Geneva Convention IV.

36. The International Committee of the Red Cross's Commentary on Geneva Convention IV suggests that the protected person requirement should be interpreted to provide broad coverage. The Commentary states that the words "at a given moment and in any manner whatsoever" were "intended to ensure that all situations and all cases were covered." INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 47 (Geneva 1958) ("*Commentary on Geneva Convention IV*"). At page 47 it further notes that the expression "in the hands of" is used in an extremely general sense.

> It is not merely a question of being in enemy hands directly, as a prisoner is . . . In other words, the expression "in the hands of" need not necessarily be understood in the physical sense; it simply means that the person is in territory under the control of the Power in question.

37. The Chamber has been presented with considerable evidence that the Bosnian Croats controlled the territory surrounding the village of Stupni Do. *See* SR at 59-60, 119, 149-151, 441-42, 453. Because the Trial Chamber has already held that there are reasonable grounds for believing that Croatia controlled the Bosnian Croats, Croatia may be regarded as being in control of this area. Thus, although the residents of Stupni Do were not directly or physically

"in the hands of" Croatia, they can be treated as being constructively "in the hands of" Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were - for the purposes of the grave breaches provisions of Geneva Convention IV - protected persons *vis-à-vis* the Bosnian Croats because the latter were controlled by Croatia. The Trial Chamber notes this holding is solely for the purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

ii. Protected property

38. Geneva Convention IV also contains several provisions that set out the types of property that are protected under the Convention. The Prosecutor has suggested that Article 53 of the Convention is the appropriate definition in this case. Article 53 provides as follows:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The Prosecutor argues that when Stupni Do was overrun by HVO forces under the command of Ivica Rajić and came under their control, "the property of Stupni Do became protected property in terms of Article 53 . . . [because] it was [Bosnian] property under the control of HVO forces, who are to be regarded as part of the opposite side, namely Croatia, in an international conflict." *Prosecutor Brief* at 9.

39. Article 53 describes the property that is protected under the Convention in terms of the prohibitions applicable in the case of an occupation. Accordingly, an occupation is necessary in order for civilian property to be protected against destruction under Geneva Convention IV. The only provisions of Geneva Convention IV which assist with any definition of occupation are Articles 2 and 6. Article 2 states: "The Convention shall also apply to all cases of partial or total occupation . . . even if the said occupation meets with no armed resistance" while Article 6 provides that Geneva Convention IV "shall apply from the outset of any conflict or occupation mentioned in Article 2."

40. The Trial Chamber has already held that Croatia may be regarded as being in control of this area. The question is whether the degree of control exercised by the HVO forces over the village of Stupni Do was sufficient to amount to occupation within the meaning of Article 53.

41. Once again, the Commentary on Geneva Convention IV suggests that the requirement may be interpreted to provide broad coverage. It states:

> The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation.

Commentary on Geneva Convention IV at 60. Other commentators have also suggested that a broad interpretation is warranted. One writer has suggested that there are certain common features which, when present, indicate the existence of an occupation, being:

> (i) there is a military force whose presence in a territory is not sanctioned . . . ;
> (ii) the military force has . . . displaced the territory's ordinary system of public order and government, replacing it with its own command structure . . . ;
> (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other . . . ;
> (iv) . . . there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

Adam Roberts, *What is a Military Occupation?*, vol. 55, Brit. Y.B. Int'l L., p. 249 at 274 - 275 (1984).

42. The Trial Chamber has held that the Bosnian Croats controlled the territory surrounding the village of Stupni Do and that Croatia may be regarded as being in control of this area. Thus, when Stupni Do was overrun by HVO forces, the property of the Bosnian village came under the control of Croatia, in an international conflict. The Trial Chamber therefore finds that the property of Stupni Do became protected property for the purposes of the grave breaches provisions of Geneva Convention IV. The Trial Chamber notes this holding is for the sole purpose of establishing subject-matter jurisdiction over the offences allegedly committed by the accused.

43. For the reasons set forth above, the Trial Chamber finds that it has subject-matter jurisdiction under Article 2 of the Statute over Counts I, II, IV and V of the indictment.

2. Article 3 - Violations of the Laws or Customs of War

44. The Trial Chamber must now consider whether it has subject-matter jurisdiction over the offences charged by the Prosecutor under Article 3 of the Statute. The first violation of Article 3 alleged by the Prosecutor is the wanton destruction of the village of Stupni Do and the second alleged violation is the attack on the civilian population of Stupni Do.

45. Article 3 of the Statute provides that the International Tribunal has the power to prosecute violations of the laws and customs of war and specifically enumerates certain violations over which the International Tribunal has jurisdiction.

46. One of the enumerated violations over which the International Tribunal has jurisdiction under Article 3(b) is the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity". The prohibitions listed in Article 3 clearly are applicable in cases of international armed conflict and may also apply in internal armed conflicts. *See Tadić Appeal Decision on Jurisdiction* at ¶ 89. The Trial Chamber has held that there is sufficient evidence to conclude that the conflict at issue here was international in character. Accordingly, the Trial Chamber does not have to consider whether the prohibition on wanton destruction reflected in Article 3(b) of the Statute extends - as a matter of customary international law - to internal armed conflicts.

47. The second violation of Article 3 alleged by the Prosecutor is the attack on the civilian population of Stupni Do. The offence of attack on a civilian population is not fully covered by the enumerated provisions of Article 3. The Appeals Chamber has determined that the list in Article 3 of the Statute is not exhaustive, and that the International Tribunal has jurisdiction over violations of the laws and customs of war in addition to the ones expressly listed in Article 3. *See Tadić Appeal Decision on Jurisdiction* at ¶¶ 87-89. Accordingly, this Chamber must ensure that such attacks constitute a violation of the laws or customs of war covered by Article 3 of the Statute.

48. In the *Tadić* case the Appeals Chamber established the principle that civilians are protected during internal armed conflicts. *Tadić Appeal Decision on Jurisdiction* at ¶¶ 119, 127. The specific issue of whether an attack on a civilian population constitutes a violation of the laws or customs of war was addressed by Trial Chamber I of the International Tribunal in the *Martić Rule 61 Decision*. Trial Chamber I held that attacks on civilian populations were prohibited under conventional and customary law in both international and internal armed conflicts. With respect to conventional law, the Chamber relied on the provisions of Additional Protocols I and II. It also found a customary prohibition on such conduct based on the Appeals Chamber Decision, resolutions of the United Nations General Assembly, Article 3 Common to the Geneva Conventions and the provisions of Additional Protocols I and II as reflective of customary law. Trial Chamber I further found that the other conditions identified in the Appeals Chamber Decision for the International Tribunal's jurisdiction under Article 3 had been met, *i.e.*, that the violation was serious because it undermined important values and had serious consequences for the victims and involved the individual criminal responsibility of the perpetrator of the violation. *See Martić Rule 61 Decision*, ¶¶ 8, 10, 19, 20. This Trial Chamber agrees with the analysis conducted by Trial Chamber I in the *Martić Rule 61 Decision* and holds that the International Tribunal has jurisdiction under Article 3 of its Statute to entertain the charge of attack against a civilian population.

49. For the reasons set out above, the Trial Chamber concludes that it has subject-matter jurisdiction over counts III and VI of the indictment against Ivica Rajić.

D. Reasonable Grounds

50. The Trial Chamber must now, pursuant to Sub-rule 61(C), determine whether the Prosecutor has established reasonable grounds to believe that Ivica Rajić committed the crimes charged in the indictment. The crimes alleged are: wilful killing of several civilians in Stupni Do, destruction of property, deliberate attack on the civilian population of Stupni Do and causing the wanton destruction and devastation of Stupni Do unjustified by military necessity.

51. The evidence submitted by the Prosecutor indicates that Stupni Do was a small village approximately four kilometres south-east of Vares in central Bosnia. In contrast to nearby Vares, Stupni Do had a mostly Muslim population of approximately two hundred and fifty people. Witnesses testified that at approximately eight o'clock on the morning of 23 October 1993, HVO soldiers under the command of Ivica Rajić attacked Stupni Do. On hearing the gunfire which signalled the beginning of the attack, villagers took to shelters, cellars, and other hiding places. Approximately forty lightly armed local villagers, constituting the local defence force, attempted to defend and protect their families and property. The shooting continued for approximately three hours, but because the villagers were the HVO's only opposition, they were soon overrun. The village defenders then withdrew to a main shelter to try to protect and warn the people located there. *See* SR at 27-29, 66-69, 148, 151, 165.

52. It appears that HVO soldiers went from house to house, searching for village residents. On finding the villagers, the evidence indicates, the HVO forced them out of the shelters and terrorised them. Witnesses statements indicate that the HVO forcibly took money and possessions from the villagers and that they stabbed, shot, raped, and threatened to kill the unarmed civilians they encountered. The HVO soldiers apparently had no regard for the defencelessness of the villagers. For example, four women who were hiding in a cellar were shot at from above. Three of the four died. The one that survived reported that she escaped from the house only to be shot at by the HVO as she ran away toward the woods. Witnesses indicated that they saw the bodies of at least sixteen unarmed residents who appeared to have been murdered in this or a similar manner. In addition, HVO soldiers attempted to burn approximately twelve civilians alive by locking them in a house and setting the house on fire. The civilians eventually managed to escape by breaking the door with an axe. Throughout the attack, HVO soldiers fired exploding phosphorus munitions into the houses, causing them to burst into flames. The HVO soldiers dragged many of the corpses into burning houses. *See* SR at 164, 330, 426-27, 434-38, 446-52.

53. According to the Registrar's Office of the Vares municipality, which was responsible for maintaining Stupni Do's death records, by the time the attack ended, thirty-seven Stupni

Do residents were dead. Nearly all of the sixty homes in the village were virtually destroyed. *See* SR at 416, 419.

54. Several witness statements report that Stupni Do had no military significance. The village had no militia to speak of; the "defence force" was made up almost entirely of village residents who came together to defend themselves. SR at 427-28. Moreover, the evidence submitted indicates that Stupni Do was located off the main road and its destruction was not necessary to fulfil any legitimate military objectives. *See, e.g.*, SR at 161.

55. The testimony and photographs submitted by the Prosecutor suggest that the civilian population of Stupni Do was the target of the attack. SR at 27-29, 47-62, 66-69, 147-48. The offensive appears to have been planned in advance, as exhibited by substantial testimony that special units commanded by Ivica Rajić came to the area from Kiseljak, a town some distance from Stupni Do, to carry out this attack. SR at 113, 163. Several witnesses indicate that a Croat woman who was married to a Muslim and lived in the village was taken by her brother from the village the night before, apparently due to his knowledge of the events that would take place the following day. SR at 68, 440. In addition, one witness testified that eight days before the attack the HVO arrested six men and detained them at a prison in Vares. Five of these men were then taken to watch the destruction of Stupni Do. SR at 484. Finally, Ivica Rajić's own statements - as reported by witnesses - indicate that the attack was deliberate. For example, evidence submitted reveals that in conversation with UNPROFOR personnel, Ivica Rajić stated that taking Stupni Do was necessary because of a prior attack by Bosnian Muslim forces against Bosnian Croats that had taken place in the area of Kopjari. SR at 100 - 101.

56. The evidence also shows that the village of Stupni Do was destroyed by the attack. SR at 82, 370-73. At the hearing, the Trial Chamber had the opportunity to view photographs of the destroyed village, as well as of burned bodies. *See generally* SR at 6-166, 327-494. Virtually every witness testified about the destruction of the village and about having seen or smelled the houses and other buildings on fire or already burned. There is no evidence that there was a military installation or any other legitimate target in the village. SR at 161.

57. Accordingly, the evidence presented by the Prosecutor provides a reasonable basis for a finding that there was wanton destruction of the village of Stupni Do, wilful killing of its civilian residents, destruction of property, and a deliberate attack on the civilian population as a whole, all of which were unjustified by military necessity. Thus, the only remaining question is that of Ivica Rajić's involvement in the attack.

58. There is significant evidence to connect Ivica Rajić with the attack on Stupni Do. *See, e.g.*, SR at 90, 95, 98, 101, 113, 121, 140, 332. For example, Ivica Rajić personally informed Colonel Ulf Henricsson, the commanding officer of the NORDBAT battalion of UNPROFOR at the time, that he was the "new brigade commander". SR at 83-84. In addition, a United Nations Military Observation officer testified that after an unsuccessful attempt to gain access to Stupni Do, he returned with Ivica Rajić and was given free access to the village through the checkpoint. SR at 24-26. Finally, Major Hakan Birger, another UNPROFOR officer, attended a meeting on or about the day of the attack with Ivica Rajić, Colonel Henricsson and Sergeant Ruzdi Ekenheim, a UNPROFOR soldier. At that meeting, Ivica Rajić presented himself as being in charge of the situation. He denied the United Nations personnel permission to enter Stupni Do. SR at 120.

59. There is proof Ivica Rajić knew about the attack and actually ordered it. Evidence of this includes the testimony of Brigadier Angus Ramsay, a UNPROFOR Chief of Staff at the relevant time. Brigadier Ramsay often dealt with Ivica Rajić prior to the attack. At those meetings, Ivica Rajić presented himself as the military commander of the HVO troops in Kiseljak. SR at 163. Brigadier Ramsay opined that Ivica Rajić was the operational commander of the Stupni Do attack and that he was senior enough in the HVO as well as brutal enough to have been in charge of the attack. SR at 162. Similarly, Sergeant Ekenheim believes that there is no question that Ivica Rajić knew about the attack. SR at 90. He testified that during the several meetings he attended at Ivica Rajić's military headquarters, Ivica Rajić had both telephone and radio. SR at 90. Sergeant Ekenheim stated that Ivica Rajić planned the attack and noted that Ivica Rajić had explicitly stated that he took over Stupni Do "because he thought the Bosnian Army would launch an attack against Vares through Stupni Do so they had to neutralise Stupni Do. It was a Bosnian stronghold filled with soldiers and traitors". SR at 101.

At one of several meetings with UNPROFOR representatives, Ivica Rajić informed Sergeant Ekenheim and Colonel Henricsson that he would not hurt the civilians, that the troops in Stupni Do were his, and, because he was in charge, he could guarantee that the civilians would not get hurt. SR at 100-101.

60. It is also evident that HVO troops in the area recognised Ivica Rajić's authority. For example, on the way to Vares, Sergeant Ekenheim and Colonel Henricsson passed a HVO checkpoint at which HVO soldiers said they could not pass without permission from Ivica Rajić, their commanding officer. SR at 100.

61. Finally, a witness who had been a member of the HVO and the Croatian Armed Forces stated that prior to the attack, most of the local HVO troops were deployed to the front line areas by Ivica Rajić. SR at 73-74. This witness believes that Ivica Rajić was in charge of the troops because Ivica Rajić had given him a hand-written note authorising him to retain his weapons while going in and out of checkpoints around Stupni Do. When they were meeting for this purpose, Ivica Rajić indicated that he was proud of his men's actions and that the casualties were normal for this type of action. SR at 72. This witness also claims that he saw Ivica Rajić slap an HVO soldier who supposedly released a girl during the Stupni Do attack. SR at 72.

E. Failure To Cooperate With The International Tribunal

62. After the indictment was initially confirmed by Judge Sidhwa, warrants of arrest addressed to the Republic of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina were transmitted on 29 August 1995. A further warrant of arrest signed by Judge Vohrah on 8 December 1995, addressed to the Republic of Croatia, was served on the Croatian Deputy Minister of Justice, Tomislav Panić, on 13 December 1995.

63. On 23 January 1996 the Registrar of the International Tribunal transmitted to the respective embassies in Belgium of the Republic of Bosnia and Herzegovina and the Republic of Croatia, and to the Minister of Justice of the Federation of Bosnia and Herzegovina, an

advertisement in respect of the indictment against Ivica Rajić and request for publication pursuant to Rule 60 of the Rules. On 12 February 1996 the Embassy of Bosnia and Herzegovina provided evidence of publication. Neither the Republic of Croatia nor the Federation of Bosnia and Herzegovina has notified the Registrar of compliance with the request.

64. To date, personal service of the indictment has not been effected on Ivica Rajić and the arrest warrants have not been executed.

65. The Prosecutor has produced a copy of an indictment issued against Ivica Rajić filed in the Branch Office in Vitez of the High Court of Travnik on 14 August 1995. This indictment, which was transferred to the High Court of Mostar on 21 August 1995, indicates that Ivica Rajić had been in custody since 3 July 1995. SR at 1372. The Trial Chamber has no information as to the outcome of these proceedings but understands from the Prosecutor that Ivica Rajić has since been released. The Trial Chamber does not know whether this was before or after service of the warrant of arrest on the Federation of Bosnia and Herzegovina.

66. The Trial Chamber believes that Ivica Rajić has been present in Croatia and in the territory of the Federation of Bosnia and Herzegovina on several occasions since his release. The Prosecutor has produced reliable information indicating that Ivica Rajić resides or has been residing in Split in the Republic of Croatia and that he visits Kiseljak, in the Federation of Bosnia and Herzegovina, for short periods. SR at 1353. In addition, the Trial Chamber has received a power of attorney, signed by Ivica Rajić while in Kiseljak, appointing a Croatian lawyer, Mr. Hodak, as his representative in the proceedings in this case.

67. The Republic of Croatia is bound to cooperate with the International Tribunal pursuant to Article 29 of the Statute. Despite the presence of Ivica Rajić on its territory, the Republic of Croatia has neither served the indictment nor executed the warrant of arrest addressed to it.

68. The Federation of Bosnia and Herzegovina is also bound to cooperate with the International Tribunal, following the signing of the Dayton Peace Agreement. Pursuant to Article X of annex 1-A of the Dayton Peace Agreement, the Federation of Bosnia and Herzegovina has undertaken to "cooperate fully with all entities involved in implementation of

this peace agreement . . . including the International Tribunal for the Former Yugoslavia." Again, despite the presence of Ivica Rajić on its territory, the Federation of Bosnia and Herzegovina has neither served the indictment nor executed the warrant of arrest addressed to it.

69. In a side letter to the Dayton Peace Agreement, on 21 November 1995, the Republic of Croatia undertook to ensure that

> personnel or organizations in Bosnia and Herzegovina which are under its control or with which it has influence fully respects [sic] and comply with the provisions of the aforementioned Annexes [i.e., annexes 1-A and 2 of the Dayton Peace Agreement].

Dayton Peace Agreement at 126 -30. Both the Security Council of the United Nations and the Presidency of the European Union have recently called upon the Republic of Croatia to use its influence on the Bosnian Croat leadership to ensure full compliance by the Federation of Bosnia and Herzegovina with its international obligations. The failure of the Federation of Bosnia and Herzegovina to comply also implies the failure of the Republic of Croatia.

70. In light of the above, the Trial Chamber considers that the failure to effect personal service of the indictment and to execute the warrants of arrest against Ivica Rajić may be ascribed to the refusal of the Republic of Croatia and the Federation of Bosnia and Herzegovina to cooperate with the International Tribunal. Accordingly, the Trial Chamber so certifies for the purpose of notifying the Security Council.

F. Conclusion

71. Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that the Prosecutor has presented reasonable grounds for believing that, on 23 October 1993, the civilian village of Stupni Do was attacked by HVO forces who were acting with Ivica Rajić's aid and assistance or on his orders. The attack appears to have been aimed at the civilian population of the village, many of whom were killed during it. The village, which had no military significance, was devastated and the civilian property in it was destroyed.

72. The Trial Chamber is satisfied that there are grounds to confirm all counts of the indictment against Ivica Rajić and to issue an international arrest warrant against him to be sent to all States. Furthermore, the Trial Chamber orders that the warrant of arrest be sent to the multinational military Implementation Force (IFOR) deployed on the territory of Bosnia and Herzegovina pursuant to the Dayton Peace Agreement.

III. DISPOSITION

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER, PURSUANT TO RULE 61,

UNANIMOUSLY

RULES that it has subject-matter jurisdiction over all counts of the indictment against Ivica Rajić;

FURTHER RULES that it is satisfied that there are reasonable grounds for believing that Ivica Rajić committed the crimes charged in all counts of the indictment against him;

HEREBY CONFIRMS all counts of the indictment;

ISSUES an international arrest warrant for Ivica Rajić; and

ORDERS that the arrest warrant shall be transmitted to all States and to the multinational military Implementation Force (IFOR).

NOTES that the failure to effect personal service of the indictment can be ascribed to the refusal to cooperate with the International Tribunal by the Republic of Croatia and by the Federation of Bosnia and Herzegovina and entrusts the responsibility of so informing the Security Council to the President of the International Tribunal, pursuant to Sub-rule 61(E).

Done in English and French, the English text being authoritative.

Gabrielle Kirk McDonald
Presiding Judge

Judge Sidhwa appends a Separate Opinion to this Decision.

Dated this thirteenth day of September 1996
At The Hague
The Netherlands

[Seal of the Tribunal]